

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SCANSOFT, INC. *
Plaintiff, *
*
vs. * CIVIL ACTION
* NO. 04-10353-PBS
VOICE SIGNAL *
TECHNOLOGIES, INC., *
et al *
Defendants. *

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE
HEARING ON OBJECTIONS TO R&R

A P P E A R A N C E S

BROMBERG & SUNSTEIN LLP
125 Summer Street
Boston, Massachusetts 02110-1618
for the plaintiff
By: Lee C. Bromberg
 Lisa M. Fleming, Esq.
 Jack C. Schecter, Esq.

CHOATE, HALL & STEWART
Exchange Place
Boston, Massachusetts 02109-2804
for the defendants
By: Robert S. Frank, Jr., Esq.
Sarah C. Columbia, Esq.
Paul D. Popeo, Esq.

Courtroom No. 19
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
March 16, 2005
2:10 p.m.

CAROL LYNN SCOTT, CSR, RMR
Official Court Reporter
One Courthouse Way, Suite 7204
Boston, Massachusetts 02210
(617) 330-1377

PROCEEDINGS

THE CLERK: All rise.

The United States District Court for the District
Court of Massachusetts is now in session.

Please be seated.

The case of ScanSoft, Incorporated versus Voice
Signal Technologies, Incorporated, et al, civil action
No. 04-10353 will now be heard before this court.

Would counsel please identify themselves for the record.

MR. BROMBERG: Lee Bromberg, Bromberg & Sunstein, for the plaintiff ScanSoft.

MS. FLEMING: Lisa Fleming, Your Honor, for the plaintiff ScanSoft as well.

MR. SCHECTER: Jack Schechter for the plaintiff

MR. FRANK: Robert Frank from Choate, Hall & Stewart for the defendants.

MS. COLUMBIA: Sarah Columbia, also from Choate, Hall & Stewart, for the defendants.

MR. POPEO: Paul Popeo, Choate, Hall & Stewart, for the defendants.

THE COURT: Before I get into objections, where is this case? How close are we to the Markman hearing?

MR. BROMBERG: Your Honor, we filed an extension, I think it's the third extension to date which pushes the Markman hearing into October I believe.

THE COURT: Can I ask -- I probably granted all this because I just grant them just if -- if you all agree, I agree kind of thing.

I found it very hard to rule on some of these issues without really knowing what the Markman claim construction is going to be, what the issues on infringement might be.

If I end up finding against one party or the other with respect to Markman, it may make a difference as to the obviousness and infringement issues. And you guys, I mean men and women, are top competitors with each other. So I understand why everyone is so skittish about some of these documents.

I am wondering whether if I move forward the Markman hearing and really rolled up my sleeves and started understanding the issues, I could make a better judgment on the objections.

And I don't know what you thought about whether that was feasible --

MR. BROMBERG: Your Honor, I don't think that is feasible because I think that the idea of the schedule as originally set by the Court was to have the factual

1 discovery completed.

2 The reality of this case, Your Honor, is that the
3 defendant is concealing the evidence most relevant to the
4 claims.

5 **THE COURT:** Let me just say this. That may be
6 true.

7 **MR. BROMBERG:** It is true, Your Honor.

8 **THE COURT:** Well, I know that you believe
9 that. I am simply saying I don't have in my gut enough
10 understanding on the issues to know whether, for example,
11 the source code is important or the diagrams that were
12 presented are sufficient. I just -- I read everything. I
13 don't know, because everyone seals everything, which let me
14 get to in a minute.

15 But I think I've read what I need to read to
16 realize that I don't understand the issues in the litigation
17 well enough to know whether, in fact, it's important to
18 claim construction or to the infringement issue. And, for
19 example, if I found noninfringement, for an example, I
20 don't -- your very strong argument that it may be related to
21 obviousness will be mooted.

22 So -- because I generally allow that kind of stuff,
23 the technical drawings (ph.) with respect to obviousness,
24 and yet you're both head-on competitors. And I usually hit
25 this issue with some understanding of what the claim -- what

1 the points and counterpoints are.

2 Let me ask you this: What do think? Can we move
3 Markman up?

4 **MR. FRANK:** Let me say that, if I may rephrase
5 your question?

6 **THE COURT:** Yes.

7 **MR. FRANK:** One, would it be helpful to you if
8 we gave you a tutorial and worked you through the patent? I
9 think the answer to that is unquestionably yes because,
10 because I think -- I came in here worried that we were not
11 going to have enough time today because I know you have
12 another commitment. And --

13 **THE COURT:** I am going to Walpole, not a thing
14 that a judge frequently admits to but they --

15 (Laughter.)

16 **MR. FRANK:** Congratulations.

17 **THE COURT:** Yes.

18 **MR. FRANK:** What I was going to seek, Your
19 Honor, is this case needs some judicial supervision. And
20 that in order for you to rule -- I was going to say roughly
21 what you said, which is that in order to rule intelligently
22 on this, we need to bring you further up the learning curve.

23 Whether that gets us to a Markman hearing in which
24 we would cheerfully engage right now, or at least a tutorial
25 so that you have worked your way through the patent, you

1 understand at least what the patent is talking about and
2 what it teaches and what it doesn't teach and what it claims
3 and what it doesn't claim.

4 What's relevant to a patent case, even from a
5 discovery point of view, is what is claimed in the patent.
6 Not some other abstraction but what is claimed. And --

7 **THE COURT:** Well, can I -- do you contest
8 infringement?

9 **MR. FRANK:** Oh, yes.

10 **THE COURT:** Because why?

11 **MR. FRANK:** Because what is described -- well,
12 for a multitude --

13 **THE COURT:** I am trying to get my sleeves --
14 why are you contesting? What are you saying that your thing
15 doesn't do that their patent claims?

16 **MR. FRANK:** May I hand up a copy of Claim 1,
17 which is the --

18 **THE COURT:** You don't have to. I know what it
19 basically says. Or at least I read it this morning.

20 **MR. FRANK:** What the patent describes and what
21 the patent claims is a voice recognition system that is
22 located at the central switch of a mobile telecommunication
23 system, a cellular telephone system.

24 And it requires that certain prescribed steps be
25 taken as part of the claim method.

1 The accused product is a voice recognition system
2 that is not at the central switch or anywhere near the
3 central switch. It's in an individual handset.

4 **THE COURT:** This is ringing a bell because I
5 think someone described this to me before.

6 Now, let me ask you this:

7 What are the claims, let me just ask you, that
8 might be disputed? Mr. Bromberg, from your point of view,
9 are there any claims --

10 **MR. BROMBERG:** So far, Your Honor, we have
11 asserted Claims 1 through 6 against Voice Signal.

12 **THE COURT:** And what are the claims that you
13 might be disagreeing on the meaning of? In other words, for
14 a claim construction? Or are you all in agreement on it?

15 **MR. BROMBERG:** We have not addressed that
16 issue yet, Your Honor, because when this case was -- when
17 the schedule was set up last year -- this case is now
18 thirteen months old by the way.

19 **THE COURT:** Right.

20 **MR. BROMBERG:** When the schedule was set up,
21 we agreed that if we went through discovery in about three
22 months followed by expert discovery in a couple months
23 thereafter, we would be ready to present the case to the
24 court on Markman.

25 But we have gotten no meaningful discovery from the

1 defendants in this case. And that has -- so this case has
2 been stuck in the mud, Your Honor, for nine or ten months at
3 this point.

11 On the other hand, if it has to do with the
12 intricacies of how the numbers or the words gets translated
13 and into a method of recognition -- I am sure I am using all
14 the wrong technical terms -- then you may well be entitled
15 to most or some of the source code. I have just got to
16 understand it better.

17 And so I am thinking that if we did at least a
18 preliminary claim construction hearing where -- and plus
19 infringement. I imagine this claim construction on that key
20 issue is going to determine infringement one way or another;
21 right?

24 THE COURT: Yes

25 MR. BROMBERG: It may well...

THE COURT: All right. So then let's say I rule in your favor.

MR. BROMBERG: Right.

THE COURT: Let's say I rule in your favor.

And let's say that they then say but there is no infringement in any event because we translate the numbers or the words differently, then I think you have the right to those source codes.

If, in fact, you lose, then I would have handed over their most confidential information for no reason. And so that's where I am thinking about. If obviousness, every case I always have they get the technical development documents. But it is when I get to obviousness.

MR. BROMBERG: Your Honor, I have two concerns with what you are proposing. One is when we started the case, the plan was to go through the discovery and then have the Markman hearing. And that is to my understanding the preferred method.

And if in the course of discovery material is disclosed, it will be disclosed in accordance with a strict protective order so there is no risk to anybody's confidentiality. We have the same risk.

But the problem is, Your Honor, that then the issues can be presented to you on an informed record, not shooting in the dark.

5 What I could simply do is affirm the magistrate
6 judge's order with the exception, of course, I'll do the
7 user interface source code which is sort of a compromise
8 between the lines in their position, and do it without
9 prejudice. And we can go all the way through. And then
10 I'll open the floodgates if you win on the key issues for
11 yourself.

14 THE COURT: "Floodgates" they may not like
15 but --

24 I generally require it to be produced when it is in
25 play.

5 THE COURT: Let me tell you --

6 MR. BROMBERG: Because we believe --

11 If I rule with you, and they assert obviousness or
12 lack of infringement for a variety of reasons, then you will
13 get this stuff.

16 There is another set of issues in this case, trade
17 secret misappropriation. And this court has ruled that they
18 are in the case, removing the excuse that Voice Signal used
19 for not producing any single piece of paper on that issue
20 yet or even instructing witnesses not to answer questions at
21 depositions, on the ground that --

1 MR. FRANK: That's not true.

2 MR. BROMBERG: If I may finish, Your Honor.

7 At Dragon and L&H they worked on speech recognition
8 software. At Voice Signal they work on speech recognition
9 software. The Superior Court said cut it out because you
10 have signed a noncompete and don't disclose your trade
11 secrets.

12 They went to work the day that order expired. They
13 went back to work. And for all we know, Your Honor, they
14 have used and employed the trade secrets of ScanSoft in all
15 of their work and are continuing to do so. We believe they
16 are.

24 THE COURT: But it's got to be things --

25 MR. BROMBERG: And it is necessary to look at

1 the source code to determine that.

2 **THE COURT:** I understand. The reason I held a
3 hearing, I almost always just affirm, okay. If it is de
4 novo, I always just affirm. I don't understand -- I
5 remember someone, maybe it was you, who gave me a diagram.
6 I remember it. The tower up here (indicating), the hand.

7 I understand there is a threshold issue there that
8 needs a ruling from me. All right.

9 Now, I don't know if I rule your way or your way,
10 it may cut out a lot of it. That's what was at least
11 flagging it for me. I am willing to do that earlier.

12 I am also willing to give you a narrower scope of
13 discovery on trade secrets that has to do with things that
14 the people who used to work at Dragon and L&H prepared,
15 commented on, emailed regarding. That seems fair enough,
16 subject to a protective order. Things that they were the
17 author of or which references them. Okay.

18 So that's a narrower scope of what you are talking
19 about. And maybe you can work something out on that.

20 I think your compromise on the user interface is
21 important because it's how the information was transmitted.
22 So I think you should produce that.

23 And the other stuff, I am either inclined not to
24 rule on or to sustain what Judge Alexander did. I know what
25 the problem she had is. She said it right here, she didn't

1 have it all in front of her in terms of understanding the
2 way I would eventually construe a claim. So she was in that
3 position. And it was a perfectly fair reading of the law
4 given that position.

5 So what I am thinking of is how many claims do you
6 think might be in dispute?

7 **MR. BROMBERG:** I think they're probably all in
8 dispute, Your Honor. But Magistrate Judge Alexander ruled
9 that they are required to turn over the entire source code.

10 **THE COURT:** Right.

11 **MR. BROMBERG:** And they have refused to do
12 that.

13 **THE COURT:** That's right. They're going to
14 turn over the user interface source code. And then maybe
15 the whole thing, depending on how I understand the case.

16 Okay. So that should happen forthwith. Any trade
17 secret -- anything -- who are the men, or women?

18 **MR. FRANK:** Your Honor, may I?

19 **THE COURT:** Yes.

20 **MR. FRANK:** Please, before we go further.

21 **THE COURT:** Yes.

22 **MR. FRANK:** Let me slow you down here and say
23 I want you to understand what this -- first, about the
24 patent. I want you to understand what the patent discloses.
25 And I want you to understand what the patent claims.

1 Because if you do this on the basis of general
2 principles, I respectfully suggest you are in real danger of
3 making -- of doing something that is unfair.

4 All I ask with respect to the patent is that this
5 slow down and that you allow us to give you a tutorial. And
6 I have proposed to Mr. Bromberg that we, you know, enter
7 into a schedule in which we identify the claim terms that
8 need to be -- that means stop.

9 **THE COURT:** Yes. I am with you to a point. I
10 need a tutorial. I need a description of what the claim
11 terms are that are in dispute. And I am willing to do
12 Markman in connection with that earlier to grapple earlier
13 than October with the claim construction issues, just so
14 that I get it.

15 Now, maybe I won't rule right out of the -- maybe
16 you're going to persuade me that I shouldn't; but at least
17 I'll understand well enough what is really in play and what
18 discovery -- if you lose on your key claims construction,
19 you don't need all the documents on obviousness.

20 **MR. BROMBERG:** I need them for the trade
21 secrets case.

22 **THE COURT:** You may. And that's why I'm going
23 to give you a narrow scope of discovery on it. That's a
24 really fair point. And so --

25 **MR. FRANK:** Please.

THE COURT: Yes. All right.

MR. FRANK: We have said to them -- recall the case. You will remember some of this.

The case came in here originally on a motion to dismiss which you allowed because they had alleged exactly in the same words, the same thing that had been alleged in a prior case by L&H. That case had been dismissed with prejudice.

They came back and pled exactly the same thing except they added the words that said, And you continue to use the trade secrets. And you allowed that too.

We have said -- and we have a motion pending which you have referred to the magistrate. We have said tell us with specificity what trade secret you believe that our guys took and are using so that we know what is relevant.

What they have consistently, persistently --

THE COURT: Is that pending before Judge Alexander?

MR. FRANK: Yes. And what we have been told is it is your ASR algorithms. Your automated speech algorithms. Every single voice recognition system in the universe uses automated speech algorithms. The question is what particular algorithm is a trade secret and is --

THE COURT: But one good place to start --
what are the men's and women's names who went over?

MR. BROMBERG: Gillick, Roth, Yamron and Grabherr.

THE COURT: Why don't you produce everything that they prepared on the speech algorithms?

MR. FRANK: We have nothing that they brought with them from --

THE COURT: How about within the first year so you know whether or not they were sort of telling people about it in emails?

MR. FRANK: They were enjoined from working for most of that year. We --

THE COURT: The first year that they worked.

MR. FRANK: We --

MR. BROMBERG: They were enjoined from September to January, Your Honor. They worked from the previous January to September and then they went right back to work when that --

THE COURT: Listen, listen, all right. I am going to do this.

I would like to understand what the issues are better, okay, in a real live sense as to what claims are in play and whether or not with respect to those claims, if I rule on them, it may well be that some of this is obviated.

So -- I remember the key one because everyone flagged it for me. So can't we just -- are there any other

1 claims that are in play?

2 **MR. FRANK:** There are some but we can serve
3 that up to you in a perfectly understandable way.

4 **THE COURT:** Can we do that sooner than
5 October?

6 **MR. FRANK:** Yes.

7 **THE COURT:** And then I will have a tutorial.
8 And then I will try and rule. And I will try and rule on
9 these in connection with that. I think that makes some
10 sense.

11 In the meantime, you can't just completely
12 stonewall on the trade secret thing. You have got to
13 produce what these men --

14 **MR. FRANK:** Your Honor, respectfully --

15 **THE COURT:** Laurence, Robert, Jonathan and
16 Manfred, yes, that these men prepared in the first, I don't
17 know, pick it up, year --

18 **MR. BROMBERG:** Why limit it to the first year,
19 Your Honor? This is a field that takes years and years of
20 work. And even the defendant company --

21 **THE COURT:** What time did they go over there?

22 **MR. BROMBERG:** They went over in January of
23 2001. Their first product that we're fighting about here
24 didn't get sold until May 2002. They have continued to do
25 updated versions of that.

1 We believe that --

2 **THE COURT:** Why don't you do 2001 to 2002?

3 **MR. FRANK:** Your Honor --

4 **THE COURT:** You know what, maybe what makes
5 the most sense is I am going to set up a schedule right now.

6 When can you file -- decide whether or not there
7 are going to be any claim definitions in dispute?

8 **MR. FRANK:** Within ten days.

9 **THE COURT:** Can you?

10 **MR. BROMBERG:** Yes.

11 **THE COURT:** Okay. And then you file your
12 Markman brief when?

13 **MR. BROMBERG:** With respect to the disputed
14 terms, Your Honor?

15 **THE COURT:** Yes.

16 **MR. BROMBERG:** We can file our Markman brief
17 within three weeks after that.

18 **THE COURT:** Okay. So that puts us when, the
19 end of April?

20 **MR. BROMBERG:** Yes.

21 **THE COURT:** Okay. And the end of April, can
22 you do something by the end of May?

23 **MR. FRANK:** Certainly.

24 **THE COURT:** And then we will have a hearing in
25 June.

MR. FRANK: Certainly. There is a counterclaim patent. And I take it we are -- do you want us to address that or not? They're complaining about our not producing any source code but they haven't produced any source code at all.

THE COURT: I imagine that, is that important.
I am just trying to get through the discovery dispute.

MR. FRANK: This discovery works both ways.

THE COURT: I understand that. Do you have claims that might be in dispute about the other patent?

MR. FRANK: I don't know.

MR. BROMBERG: I think the counterclaim is --
their own chief technical officer couldn't find
correspondence between that -- the elements of those claims,
the two claims that they say are infringed, and any
product of ours.

THE COURT: All I want to know is whether there is any claim construction issues. So why don't you just flag them for me. I don't necessarily have to resolve them. I'm not sure they're important on the discovery issue.

Now, you will do by the end of May. Robert, when can we do a claim construction hearing?

THE CLERK: June 17th at two p.m.

17 Now, on the trade secret, which I understand is a
18 ripe dispute between the two of you --

1 what we have said is that one cannot determine what is
2 relevant to the trade secret claim until the allegedly
3 misappropriated trade secret is identified.

4 And when the allegedly misappropriated trade secret
5 is identified, then you or Magistrate Alexander can tell
6 whether they're asking for something that is relevant to
7 that trade secret.

8 **THE COURT:** There is a notion in the law that
9 you can't possibly do that. In other words, if someone came
10 up with almost an identical product the minute after its
11 employees -- wait. Now, I know you are frustrated here.

12 Very soon after the employees leave, there is at
13 least enough to draw an inference.

14 Now, I understand that you had a suit in superior
15 court or wherever so that it wasn't the initial stuff.
16 There was a continuing to use.

17 **MR. FRANK:** Respectfully, you're ruling in a
18 vacuum (ph.).

19 The product which was sold by their predecessor was
20 a voice recognition product that worked with a PC, which has
21 enormous, relatively enormous processing power and memory
22 capabilities and so on.

23 The particular individuals here were working on yet
24 other projects, also so-called large platform products.

25 The accused product here is something that has to

1 work in a cell phone in which there is a miniscule amount of
2 processing capacity, no caching capability, no memory at
3 all.

4 The assumption that you're making which is that
5 these products are anything more than in the enormous area
6 of voice recognition is simply wrong.

7 **THE COURT:** I understand you.

8 Has the motion before Judge Alexander been opposed?

9 **MR. BROMBERG:** It has been opposed, Your
10 Honor.

11 **THE COURT:** Do you have a hearing in front of
12 her?

13 **MR. BROMBERG:** We have not had a hearing
14 scheduled yet.

15 **THE COURT:** I am going to ask Mr. Alba to find
16 out when that is going to happen and then she can rule on
17 it. And then -- but I will simply say this:

18 I anticipate there will be some discovery as to
19 what these gentlemen provided the new company.

20 **MR. FRANK:** We simply ask that there be a
21 framework in which the relevance of that discovery can be --

22 **THE COURT:** I think, maybe. Maybe. It's
23 always a little hard for them to pinpoint with specificity
24 exactly what they disclosed when they don't know that. When
25 they just know that in their view it's a similar algorithm

1 or it's a similar product.

2 Now, I don't know enough about it. You are right,
3 I am not going to rush and I am not going to do it. I will
4 wait for Judge Alexander's ruling.

5 But I am simply saying that at some point I
6 wouldn't be surprised if we are going to end up that -- this
7 is not overruling by any means Mr. Bromberg's objection on
8 this. I would wish you'd work it out. These cases turn
9 into nightmares.

10 I will understand it better after the claim
11 construction dispute. But in the meantime, I will wait for
12 Judge Alexander's ruling on that. And then if are you
13 unhappy with it, you will appeal I am sure.

14 Now, let me go off the record.

15 (Discussion off the record.)

16 **THE COURT:** Let's go back on the record.

17 **MR. BROMBERG:** I want to state my objection to
18 the Court proceeding in this fashion. And I'd like, if I
19 may, to have just a minute to explain why.

20 The defense in this case has followed the following
21 strategy:

22 Give them no evidence on the trade secret claim.
23 Defeat the patent claim hopefully at a claim construction
24 hearing. And then the clock will be run out on discovery
25 and they'll never see any evidence relating to --

THE COURT: I won't do that to you.

MR. FRANK: And I won't ask you to do that.

THE COURT: I promise you, I will -- if you are entitled to it, you will get it. If you get cut off at the knees at an early stage, you are not entitled to it.

But if you win on your primary claims, you are likely to get all this. And I won't say, well, the discovery clock stops. I will give you an extension.

MR. BROMBERG: Okay. Well, I appreciate that, Your Honor. But I think the effect of the Court's ruling today is to endorse the strategy that Voice Signal has very aggressively followed to give us no evidence on the trade secret case. And to withhold the source code, even though Magistrate Alexander has ordered them three times to produce it, and it endorses that whole policy. And that does, Your Honor, contribute to the cost of this proceeding.

If they had cooperated in the discovery initially, and these things are routine in patent cases as Your Honor knows, a confidentiality order --

THE COURT: This point, you have made these points. I am actually not disagreeing with a whole lot of what you are saying.

But I need to understand it better before I start turning over this stuff. And to make it clear, you really need to turn over the user interface.

1 We will stand in recess.

2 **THE CLERK:** Court is in recess.

3 (WHEREUPON, the proceedings were recessed at 2:40

4 p.m.)

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C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.



CAROL LYNN SCOTT
Official Court Reporter
John J. Moakley Courthouse
1 Courthouse Way, Suite 7204
Boston, Massachusetts 02210
(617) 330-1377